BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34619

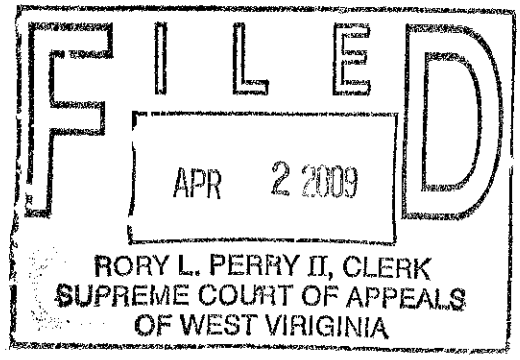
MICHELLE JONES, in her capacity as Administratrix of the Estate of Julia Toler, Deceased,

Appellant,

v.

EDWARD R. SETSER, M.D.; ST. MARY'S HOSPITAL OF HUNTINGTON, INC.; and HUNTINGTON CARDIOTHORACIC SURGERY, INC.,

Appellees.



BRIEF OF APPELLANT

Respectfully submitted,

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I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

Appellant files this Appeal Brief pursuant to Rule 10(a) of the West Virginia Rules of Appellate Procedure. Appellant seeks reversal of an Order issued by the Circuit Court of Cabell County, West Virginia, the Honorable John L. Cummings presiding, and entered on August 7, 2008, denying plaintiff's motion to set aside the verdict and award a new trial and for sanctions, based on:

(a) Improper comments and conduct in closing argument which rose to the level of plain error so egregious that it entitles plaintiff to a new trial and sanctions.

(b) The intentional violation by defense counsel of a motion *in limine* granted by the trial court so egregious that it entitles plaintiff to a new trial and sanctions.

II. STATEMENT OF FACTS

This case is a medical malpractice case where Mrs. Toler, deceased, underwent open-heart surgery by defendant physician. During surgery, the decedent's aorta was lacerated. The issue at trial was whether the laceration and consequent damages was a result of deviations from the standard of care of the doctor and his employer.

The trial of the case was without error until the closing minutes of the defendants' closing argument. As the defense attorney completed his closing, using a "power point" presentation projected behind plaintiffs' counsel, he put on the screen a cartoon from the comic strip "Wizard of Id." This comic strip had run in numerous

newspapers on Thursday, May 22, 2008, including the Herald Dispatch in Huntington where the case was being tried. The cartoon is as follows:

(See Index at pp. 5-17.) Defense counsel then stated as follows:

MR. OFFUTT: There was a cartoon yesterday in the Herald Dispatch that interested me. It was the Wizard of Id. This woman, woman or man, is having her fortune told. She says, "I made contact with your recently departed Uncle Ned." The person says, "You have? What did he say?" She said, "He wants you to sue the doctor."

I think that this is a reflection of society today where --

MR. MASTERS: Objection, Your Honor.

THE COURT: Sustained.

MR. OFFUTT: Ms. Eifert told you that this is one of those complications where we don't want to think about. You know, medicine has gotten so advanced, and complications are rare today. But, they do still happen.

You know, think about it. **If Dr. Setser had done what Dr. Herman and Mr. Masters claim he should have done in this case,** and cannulated her in advance, and there had been one of these complications, **and we would have had a bad outcome -- they would have been in here criticizing him for doing an unnecessary procedure,** and said, "Well, there's no risk on the CT. There's no risk on the x-ray."

MR. MASTERS: Objection, Your Honor.

THE COURT: That one is overruled.

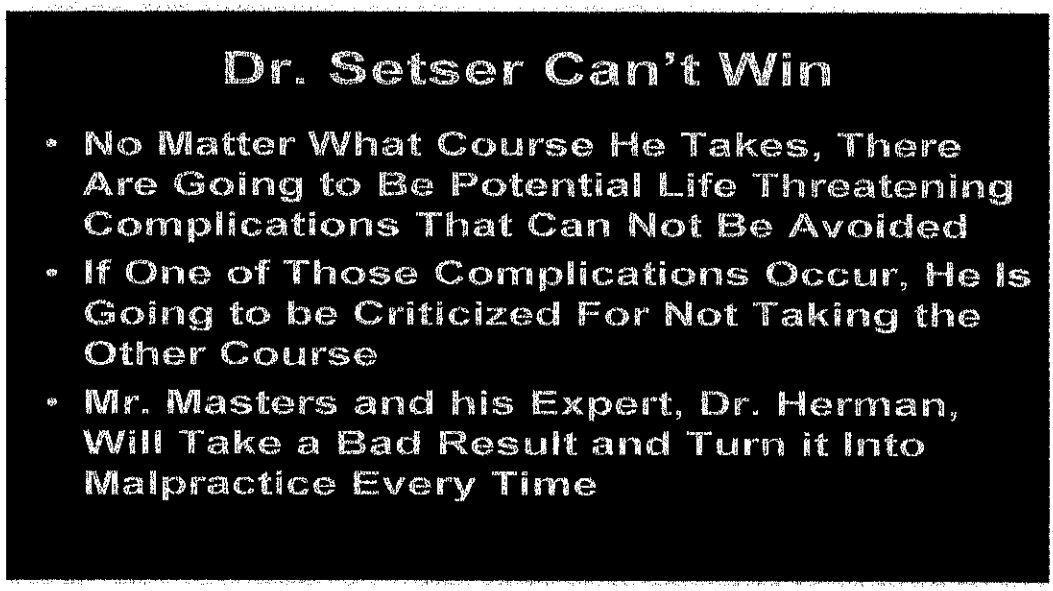
MR. OFFUTT: So, if any complication occurs, no matter which way Dr. Setser goes, he's going to be criticized for doing the wrong thing, because in hindsight, you can take apart anything and criticize. **The doctor is always going to be criticized and held accountable, because we're going to require that doctor to be infallible. You can take a bad result and turn it into a malpractice case every time.**

* * *

We're fortunate to have well-trained and caring physicians like him, and others in the area, to treat us and our loved ones. If we hold them to an infallible standard, they simply can't practice. That's not what the law requires. That's why the law doesn't require it.

(See Index at p. 18, Trial Transcript dated May 23, 2008 at pp. 3-5, emphases added.)

Defense counsel also put on the screen the following as he made these final arguments:



(See Index at pp. 34-52, Defense Counsel's Power Point presentation at p. 17.) Clearly, such argument by necessity implies that plaintiff's counsel and expert witness would conspire to fabricate opinions and testimony and constitutes a highly improper and prejudicial attack on the integrity, honesty, and credibility of plaintiff's counsel and expert witness.

Importantly, the comic strip was published in the newspaper. Whether the jurors saw it before defense counsel commented on it or not, the fact that it was published gave it significant credibility. It was not evidence introduced in the case. It was a comic strip but one which frequently addressed social issues in a way to evoke criticism. Exhibiting any newspaper article or comment to the jury without agreement or stipulation or by way of evidence is plain error. The conduct was not merely objectionable; it was outrageous.

Prior to the return of the jury, plaintiff's counsel moved for mistrial on these comments. (See Index at p. 18, Trial Transcript dated May 23, 2008 at p. 6.) The jury returned its verdict for defendants on May 23, 2008. (See Supp. Index at pp. 128-136.) Even though the trial court found that "the cartoon used by defense counsel during closing argument exceeded the boundaries and limitations of proper argument," the trial court denied plaintiff's motion for mistrial, and denied plaintiff's motion to set aside the verdict and award a new trial and plaintiff's motion for sanctions. (See Index at pp. 53-56, Letter from Judge Cummings dated July 10, 2008.)

The trial court had entered an order prior to these remarks prohibiting defense counsel from arguing to the jury about a medical malpractice litigation crisis, or that

cases such as plaintiffs' are the reason why the courts are clogged or causing problems with the court system. (See Index at pp. 1-4, Order regarding Plaintiff's Motions *in Limine* dated May 18, 2008.) This particular motion *in limine* was granted by the trial court. Nonetheless, after a weeklong trial, at closing argument defense counsel introduced a comic strip derogatory of medical malpractice actions and directed toward plaintiff and her counsel. (See Index at pp. 5-17, comic strip.) Defense counsel then coupled it with a false analogy, stating that plaintiff would, in fact, sue regardless of what defendants did, i.e., had defendants actually performed the procedures which plaintiff argued were required, plaintiff would then have sued them for performing such procedures. Defense counsel also mischaracterized plaintiff's position as to the burden of proof applicable to medical malpractice actions and argued that health care providers such as the defendants could not remain in practice here if held to such standard of care. (See Index at p. 18, Trial Transcript dated May 23, 2008 at p. 5.)

The defendants' conduct above included the cartoon making fun of persons who sue their doctor, and then following up with the comment:

(a) "I think that this is a reflection of society today. . . ."

(b) ". . . they would have been in here criticizing him for doing an unnecessary procedure. . . ." (Objection overruled.)

(c) "So, if any complication occurs, no matter which way Dr. Setser goes, he's going to be criticized. . . ."

(d) "Mr. Masters and his expert, Dr. Herman, will take a bad result and turn it into malpractice every time."

(*Id.*, see also pp. 34-52, Defense Counsel's Power Point presentation at p. 17.) Altogether, these comments clearly argued a "malpractice litigation crisis," etc. It was so prejudicial that plaintiff could not have had a fair trial.

Not only did defense counsel argue a litigation crisis by claiming it was "a reflection of society today," but he also included the jury in his points by claiming:

(a) "**We're** fortunate to have well-trained and caring physicians like him [Dr. Setser], **and others** in the area, to treat **us and our loved ones.** If **we** hold them to an **infallible standard, they simply can't practice.**" (Emphases added.)

(b) Dr. Setser, and Dr. George, have both devoted their careers to providing the highest level of cardiovascular care to the citizens of this area, and they did in this case."

(See Index at p. 18, Trial Transcript dated May 23, 2008 at p. 5.)

Therefore, the above arguments are tied to the "infallible standard." Defense counsel states, ". . . because **we're** going to require that doctor to be infallible." (*Id.* at p. 4, emphasis added.) Further, reinforcing this argument to the jury and its validity was the judge's decision to overrule the second objection. Defense counsel was allowed to continue the societal problem of doctors being sued for nothing and essentially being driven from practice. Indeed, defense counsel argued (incorrectly and inappropriately) that if plaintiff's theory of the case was accepted doctors would be held to an infallible standard and such doctors which "[w]e're fortunate to have . . . to treat us and our loved ones " would be driven from practice here. (*Id.*, at p. 5.) Clearly, such meritless

appeals to the passion, prejudice, and self-interests of jurors are improper and prejudicial and have no place in closing argument.

Defendants' argument that plaintiff's attorney and plaintiff's expert would "take a bad result and turn it into a malpractice case every time" was yet another false statement without evidence or basis and was so inflammatory that alone it entitled plaintiff to a new trial. (*Id.* at 4, see also pp. 34-52 Defense Counsel's Power Point presentation at p. 17.) As previously noted, it clearly constituted an attack on the integrity, honesty, and credibility of plaintiff's counsel and her expert witness inasmuch as it by necessity implied that they would conspire to fabricate opinions and testimony regardless of the actual facts.

III. ASSIGNMENTS OF ERROR

A. WHEN COUNSEL INTENTIONALLY AND PREMEDITATIVELY PREJUDICES THE JURY IN CLOSING ARGUMENT, THE AGGRIEVED PARTY IS ENTITLED TO A NEW TRIAL.

B. WHEN COUNSEL INTENTIONALLY AND PREMEDITATIVELY PREJUDICES THE JURY IN CLOSING ARGUMENT, THE AGGRIEVED PARTY IS ENTITLED TO SANCTIONS, INCLUDING ATTORNEY FEES AND COSTS OF THE TRIAL.

IV. POINTS AND AUTHORITIES RELIED UPON

(1) Rule 59(a) of the West Virginia Rules of Civil Procedure provides, in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law. . . ." W.Va.R.Civ.P. 59(a).

(2) "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976). *Accord* Syl. Pt. 1, *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W.Va. 358, 572 S.E.2d 881 (2002); Syl. Pt. 1, *Keesee v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004).

(3) "Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978). *Accord* Syl. Pt. 8, *Mackey v. Irisari*, 191 W.Va. 742, 445 S.E.2d 742 (1994); Syl. Pt. 1, *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999).

(4) "Though wide latitude is accorded counsel in arguments before a jury, such arguments may not be founded on facts not before the jury, or inferences which

must arise from facts not before the jury." Syl. Pt. 3, *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961). *Accord* Syl. Pt. 2, *Jenrett v. Smith*, 173 W.Va. 325, 315 S.E.2d 583 (1983); Syl. Pt. 10, *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997).

(5) In making a closing argument, "[c]ounsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled." West Virginia Trial Court Rule 23.04(b).

(6) Reversible error occurs in closing argument, when counsel, rather than relying upon the evidence, appeals to the local sentiment, prejudices, passions, and sympathies of jurors in favor of a local doctor. *Rush v. Hamdy*, 255 Ill.App.3d 352, 359-60, 627 N.E.2d 1119, 1123-24 (1993); *Torrez v. Raag*, 43 Ill.App.3d 779, 782-84, 357 N.E.2d 632, 634-35 (1976); *Kuhnke v. Fisher*, 210 Mont. 114, 121-23, 683 P.2d 916, 920-21 (1984); *Pederson v. Dumouchel*, 72 Wash.2d 73, 83-84, 431 P.2d 973, 980 (1967).

(7) Reversible error occurs in closing argument, when counsel, without support from the evidence of record, makes attacks upon or impugns the character, integrity, honesty, or credibility of opposing counsel or witnesses. *Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 559-62, 839 N.E.2d 441, 444-47 (2005); *Geler v. Akawie*, 358 N.J. Super. 437, 463-72, 818 A.2d 402, 418-24 (2003); *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 53-54, 558 N.Y.S.2d 511, 512 (1990); *Board of County Commissioners v. GLS LeasCO, Inc.*, 394 Mich. 126, 130-39, 229 N.W.2d 797, 800-04

(1975); *United States v. Holmes*, 413 F.3d 770, 774-77 (8th Cir. 2005); *State v. Smith*, 167 N.J. 158, 177-89, 770 A.2d 255, 266-73 (2001); *Jenkins v. State*, 563 So.2d 791, 791-92 (1st Dist. Ct. App. 1990); *People v. Tyson*, 423 Mich. 357, 373-76, 377 N.W.2d 738, 745-47 (1985).

(8) "[T]his Court reviews rulings by a trial court concerning the appropriateness of argument by counsel before the jury for an abuse of discretion. `[A] trial court has broad discretion in controlling argument before the jury,' . . . and such discretion `will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.'" *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 639, 520 S.E.2d 418, 427 (1999) (quoting *Dawson v. Casey*, 178 W.Va. 717, 721, 364 S.E.2d 43, 47 (1987) (per curiam); and Syl. Pt. 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927)).

(9) "Once a trial judge rules on a motion *in limine*, that ruling becomes the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified." Syllabus Point 4, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

Syl. Pt. 4, *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001).

(10) Like any other order of a trial court, *in limine* orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel. It would entirely defeat the purpose of the motion and impede the administration of justice to suggest that a party unilaterally may assume for himself the authority to determine when and under what circumstances an order is no longer effective. A party who violates a motion *in limine* is subject to all sanctions legally available to a trial court, including contempt, when a trial court's evidentiary order is disobeyed.

To be clear, the only participant not bound by the *in limine* ruling is the trial court.

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 113, 459 S.E.2d 374, 390 (1995). *Accord Honaker*, 210 W.Va. at 60, 552 S.E.2d at 795.

(11) Notwithstanding the availability of sanctions under the *Rules of Civil Procedure* and the availability of disciplinary action for violations of the *Rules of Professional Conduct*, a trial court always has inherent authority to regulate and control the proceedings before it and to protect the integrity of the judicial system. As noted by the Florida Supreme Court in *Levin[, Middlebrooks, Mabie Thomas, Mayes & Mitchell, P.A., v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994)]:
"[c]learly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt."
Levin, 639 So.2d at 608-9. Where an attorney's misconduct so offends the integrity of the judicial system and a party's right to a fair trial, the trial court has inherent authority to impose corrective sanctions.

Clark v. Druckman, 218 W.Va. 427, 434-35, 624 S.E.2d 864, 871-72 (2005).

V. DISCUSSION OF LAW

Defendants' conduct was not based on evidence introduced at trial. (See Index at p. 18, Trial Transcript dated May 23, 2008.) They clearly violated the rules with respect to proper argument to a jury and violated plaintiffs' motion *in limine*. (See Index at pp. 1-4, Order dated May 18, 2008.) Plaintiff preserved the error by twice objecting to the remarks of counsel during his closing and also moving for a mistrial.[1] Defendants' misconduct could not be remedied by any objection, instruction, or other court

[1] Even if plaintiff had not preserved the error for review by objecting and moving for a mistrial, plaintiff submits that defense counsel's remarks constituted "plain error" which would be subject to review even if not otherwise properly preserved. *Honaker v. Mahon*, 210 W.Va. 53, 60, 552 S.E.2d 788, 795 (2001).

intervention. They were ineradicable and were the traditional "bell once rung" dilemma.

Plaintiff submits that defense counsel indeed intended the statements to have that effect on the jury. As previously noted, there was no evidence to support such arguments or any other valid reason or basis for such arguments except to inflame and prejudice the jury against plaintiff.

In addition to requiring a new trial, the defendants' misconduct entitles plaintiff to sanctions in the amount of costs and attorney fees necessary to try the case. Without both remedies being awarded, how else can defendants or defense counsel who make such improper comments in closing for the purpose of "flushing" a losing case ever be effectively discouraged from doing so? What is the risk to an insurance carrier to try a malpractice case two times? Plaintiff, therefore, also moved the trial court for an award of the attorney fees and costs incurred by plaintiff in trying the case against defendants, their counsel and insurance carrier, in addition to a new trial. (See Index at pp. 5-17 & 19-33, Plaintiff's Motion to Set Aside the Verdict and Award a New Trial and for Sanctions, and supporting Memorandum of Law.)

While recognizing that defense counsel's use of the cartoon during his closing argument exceeded the boundaries and limitations of proper argument, the trial court apparently (and mistakenly) believed that sustaining plaintiff's objection on such basis was sufficient to cure any prejudice or injustice to plaintiff. It also erred in concluding that defense counsel's use of the cartoon during his closing did not violate paragraph 9 of the Court's Order which granted plaintiff's relevant motion *in limine* and provided

that "the defendants be precluded from arguing to the jury about the medical malpractice litigation crisis, or that cases such as plaintiffs are the reason why the courts are clogged or causing problems with the court system." (See Index at pp. 1-4, Order regarding Plaintiff's Motions *in Limine* dated May 18, 2008.) Obviously, plaintiff could not foresee that defense counsel would use a cartoon from a newspaper (which had not yet been published at the time she filed her motion *in limine*) in order to ridicule plaintiff and her family and to attack the filing of medical malpractice actions in general. However, it cannot be seriously argued in good faith that such tactic and accompanying remarks utilized by defense counsel did not fall within the reasonable scope and purpose of plaintiff's motion *in limine*. Moreover, in its ruling, the trial court failed to consider the other improper remarks and argument of counsel, raised in plaintiff's motion and accompanying memorandum of law, which added to and increased the prejudice and manifest injustice caused the plaintiff.

A. WHEN COUNSEL INTENTIONALLY AND PREMEDITATIVELY PREJUDICES THE JURY IN CLOSING ARGUMENT, THE AGGRIEVED PARTY IS ENTITLED TO A NEW TRIAL.

Rule 59(a) of the West Virginia Rules of Civil Procedure provides, in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law. . . ." This Court has repeatedly held that "[a]n appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial." Syl. Pt. 4, *Young v. Duffield*, 152 W.Va. 283, 162

S.E.2d 285 (1968). *Accord* Syl. Pt. 2, *In re State of West Virginia Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994).

As similarly stated, "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976). *Accord* Syl. Pt. 1, *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W.Va. 358, 572 S.E.2d 881 (2002); Syl. Pt. 1, *Keesee v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004).

As to the proper purpose and scope of closing arguments, this Court has held that "[g]reat latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978). *Accord* Syl. Pt. 8, *Mackey v. Irisari*, 191 W.Va. 742, 445 S.E.2d 742 (1994); Syl. Pt. 1, *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999). *See also United States v. Morris*, 568 F.2d 396, 401-02 (5th Cir. 1978) (discussing parameters of proper closing argument); *United States v. Garza*, 608 F.2d 659, 662-63 (5th Cir. 1979) (same). Furthermore, "[t]hough wide latitude is accorded counsel in arguments before a jury, such arguments may not be founded on facts not before the jury, or inferences which must arise from facts not before the jury." Syl. Pt. 3, *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961). *Accord* Syl. Pt. 2, *Jenrett v. Smith*, 173 W.Va.

325, 315 S.E.2d 583 (1983); Syl. Pt. 10, *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997). Indeed, the West Virginia Trial Court Rules provide, in pertinent part, that in making a closing argument, "[c]ounsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled." West Virginia Trial Court Rule 23.04(b).

Upon appeal, "this Court reviews rulings by a trial court concerning the appropriateness of argument by counsel before the jury for an abuse of discretion. `[A] trial court has broad discretion in controlling argument before the jury,' . . . and such discretion `will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.'" *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 639, 520 S.E.2d 418, 427 (1999) (quoting *Dawson v. Casey*, 178 W.Va. 717, 721, 364 S.E.2d 43, 47 (1987) (per curiam); and Syl. Pt. 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927)).

In the present case, defense counsel's comments, as outlined above, were without a doubt highly prejudicial and improper insofar as they were not based upon any evidence of record and were designed to appeal to the prejudice, passion, and local sentiment and fears of the jury. Indeed, numerous courts have found that similar comments made on behalf of local healthcare providers were improper. *See, e.g., Rush v. Hamdy*, 255 Ill.App.3d 352, 359-60, 627 N.E.2d 1119, 1123-24 (1993) ("Defense counsel's remarks that Hamdy's professional reputation was `on the line' or `at stake' were improper as they were not supported by the evidence. Commentary in closing

argument is limited to facts in evidence. . . . Even in the absence of the *in limine* order, counsel's comments were inappropriate. A reference to the impact of an adverse verdict upon defendant's professional reputation is improper as it interjects an improper element into the case and is little more than an appeal to the passions and sympathy of the jury."); *Torrez v. Raag*, 43 Ill.App.3d 779, 782-84, 357 N.E.2d 632, 634-35 (1976) (affirming award of new trial in a "close case" evidence-wise, where defense counsel remarked in closing that he was concerned about physician's continued right to practice medicine as a result of lawsuit, despite that objection was sustained, remark was never completed, and motion for mistrial was not made); *Kuhnke v. Fisher*, 210 Mont. 114, 121-23, 683 P.2d 916, 920-21 (1984) (reversing denial of new trial where defense counsel made several improper remarks in closing including a "Good Samaritan" argument on behalf of doctor who rendered emergency care without compensation, referenced effect of lawsuit on doctor's reputation in violation of ruling of motion *in limine*, and made an appeal to the local prejudice and passion of jury for local doctor); *Pederson v. Dumouchel*, 72 Wash.2d 73, 83-84, 431 P.2d 973, 980 (1967) (finding remarks of defense counsel intended "to turn the jury into a hometown rooting section" for doctor to be improper and holding that "[a] case should be argued upon the facts without an appeal to prejudice").

Likewise, numerous courts have also held that reversible error occurs in closing argument, when counsel, without support from the evidence of record, makes attacks upon or impugns the character, integrity, honesty, or credibility of opposing counsel or

witnesses. As explained by the court in *Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 559-62, 839 N.E.2d 441, 444-47 (2005):

> Closing argument presents counsel with the opportunity to comment on the evidence and the reasonable inferences to be drawn from the evidence. . . . Remarks or arguments that are not supported by the evidence and are designed to arouse passion or prejudice to the extent that there is a substantial likelihood that the jury may be misled are improper. . . . **"When argument spills into disparagement not based on any evidence, it is improper." . . . Counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses**. . . . It is the trial court's duty to see that counsel's statements are confined to proper limits and to prohibit counsel from creating an atmosphere of passion and prejudice or misleading the jury. . . . **Abusive comments directed at opposing counsel, the opposing party, and the opposing party's witnesses should not be permitted. . . . If there is room for doubt about whether counsel's improper remarks may have influenced the outcome of the case, that doubt should be resolved in favor of the losing party**. . . .

(Emphases added; citations omitted). *Accord Geler v. Akawie*, 358 N.J. Super. 437, 463-72, 818 A.2d 402, 418-24 (2003) (court finding attorney misconduct in closing argument and awarding new trial; noting in part that "trials must be conducted fairly and with courtesy toward the parties, witnesses, counsel, and the court" and "Yet despite our clear precedent, counsel filled his closing argument with derisive and derogatory comments regarding defendants, their counsel, their witnesses and their evidence in general, the cumulative effect of which undoubtedly affected the jury's deliberations."); *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 53-54, 558 N.Y.S.2d 511, 512 (1990) (reversing verdict and awarding new trial where counsel in his summation "engaged in an unfair and highly prejudicial attack upon the credibility and competence of defendants' expert witnesses and attorneys"; including referring to experts as "hired guns" brought in to

"fluff up the case" and "fill up some time"); *Board of County Commissioners v. GLS LeasCO, Inc.*, 394 Mich. 126, 130-39, 229 N.W.2d 797, 800-04 (1975) (finding repeated improper remarks and attacks on opposing counsel); *United States v. Holmes*, 413 F.3d 770, 774-77 (8th Cir. 2005) (reversing verdict and awarding new trial based upon improper comments during closing argument; holding that "personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case"; finding comments that opposing counsel and party was trying to distract and change the focus of jury's attention elsewhere and needed to get their stories straight constituted an implicit accusation that opposing counsel and his party were conspiring to fabricate testimony); *State v. Smith*, 167 N.J. 158, 177-89, 770 A.2d 255, 266-73 (2001) (finding prosecutors comments during closing argument that defense experts charged "hefty fees" which would "influence them to shade their testimony" because they "hope[d] to get hired by persons in the future in similar situations" were egregious and required a new trial); *Jenkins v. State*, 563 So.2d 791, 791-92 (1st Dist. Ct. App. 1990) (finding prosecutor's comments during closing accusing defense counsel of further victimizing the victim and of seeking an acquittal at all costs rather than searching for the truth constituted a personal attack on opposing counsel which was clearly improper); *People v. Tyson*, 423 Mich. 357, 373-76, 377 N.W.2d 738, 745-47 (1985) (finding reversal and new trial required where prosecutor improperly argued during closing that defense expert only testified on behalf of defendant because he was paid).

As to violations of rulings on motions *in limine*, this Court in *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001), set forth the following relevant Syllabus Points:

"Once a trial judge rules on a motion *in limine*, that ruling becomes the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified." Syllabus Point 4, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

A deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. However, in order for a violation of a trial court's evidentiary ruling to serve as the basis for a new trial, the ruling must be specific in its prohibitions, and the violation must be clear.

In deciding whether to set aside a jury's verdict due to a party's violation of a trial court's ruling on a motion *in limine*, a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent. The violation of the court's ruling must have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. A court should also consider the inflammatory nature of the violation such that a substantial right of the party seeking to set side the jury's verdict was prejudiced, and the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources. The court may also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

Syl. Pt. 4, 5, & 6, *Honaker v. Mahon, id.*

This Court also explained in *Tennant*:

Like any other order of a trial court, *in limine* orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel. It would entirely defeat the purpose of the motion and impede the administration of justice to suggest that a party unilaterally may assume for himself the authority to determine when and under what circumstances an order is no longer effective. **A party who violates a motion *in limine* is subject to all sanctions legally available to a trial court, including contempt, when a trial court's evidentiary order is disobeyed. To be clear, the only participant not bound by the *in limine* ruling is the trial court.**

* * *

> The purpose of a motion *in limine* is to prevent an opposing party from asking prejudicial questions, or introducing prejudicial evidence, in front of the jury without asking the trial court's permission. Jurisdictions are generally in agreement that a deliberate and intentional violation of a trial court's ruling on a motion *in limine,* and thereby the intentional introduction of prejudicial evidence, is a ground for reversing a jury's verdict. However, "[i]n order for a violation of an in limine motion to serve as the basis for a new trial, the order must be specific in its prohibitions, and violations must be clear." *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994).

Tennant, 194 W.Va. at 113, 459 S.E.2d at 390 (emphases added; footnote omitted). *Accord Honaker*, 210 W.Va. at 60, 552 S.E.2d at 795.

Utilizing these principles in *Honaker*, this Court held that a new trial was required where defense counsel in violation of a prior ruling on a motion *in limine* had questioned a witness concerning the time and circumstances under which the administratrix of the decedent's estate had hired an attorney. Indeed, the Court found that such conduct of defense counsel rose to the level of plain error so as to justify a new trial even though plaintiff's counsel had not objected at the time of defense counsel's misconduct. *Honaker*, 210 W.Va. at 59-62, 552 S.E.2d at 794-97.

Applying the above holdings to the present case, contrary to the circuit court's conclusion, defense counsel's comments during closing argument constituted a deliberate and intentional violation of the court's ruling on plaintiff's motion *in limine;* thereby resulting in the intentional introduction of prejudicial matters into the trial. As previously noted, plaintiff obviously could not foresee that defense counsel would use a cartoon from a newspaper (which had not yet been published at the time she filed her motion *in limine*) in order to ridicule plaintiff and her family and to attack the filing of

medical malpractice actions in general. However, it cannot be seriously argued in good faith that such tactic and accompanying remarks utilized by defense counsel did not fall within the reasonable scope and purpose of plaintiff's motion *in limine*. *See* Syl. Pt. 3, *Lacy v. CSX Transp. Inc.*, 205 W.Va. at 639, 520 S.E.2d at 427 (holding in a related context that as to closing arguments, a contemporaneous objection need not be made when the party previously objected to *in limine* ruling and the argument subsequently pursued by the opponent *reasonably falls within the scope afforded by the court's ruling*); Syl. Pt. 8, *State v. Mills*, 211 W.Va. 532, 546-47, 566 S.E.2d 891, 905-06 (2002) (same); *State v. Walker*, 207 W.Va. 415, 418-19, 533 S.E.2d 48, 51-52 (2000) (same).

Defense counsel's comments were reasonably calculated to cause, and did cause, the rendition of an improper judgment. The comments were of a highly inflammatory nature, prejudicing the substantial rights of plaintiff. Additionally, in the present case, it cannot be reasonably disputed that defendants' comments prejudiced, misled, and confused the jury and wasted scarce judicial resources. Moreover, as previously submitted, the highly prejudicial and egregious nature and effect of defendants' comments could not have been cured by a jury instruction. *See also O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309, (5th Cir. 1977) (acknowledging that the cleansing effect of cautionary instructions can be dubious for "`[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.' Stated another way, the bench and bar are both aware that cautionary instructions are effective only up to a certain point."); *Geler*, 358 N.J. Super. at 471, 818 A.2d at 423 (quoting *Fineman v. Armstrong*, 774 F. Supp. 266, 270 (D.N.J. 1991), *aff'd* 980 F.2d 171 (3d Cir. 1992)) ("`It is

beyond refute . . . that cautionary instructions do not necessarily remove the probablility of prejudice.'").

Plaintiff also submits that even if defense counsel's remarks did not violate a ruling on a motion *in limine*, such comments would be improper and justify a new trial due to their highly prejudicial and egregious nature and lack of support in the evidence, as already discussed above. *See Rush v. Hamdy*, 255 Ill.App.3d at 359-60, 627 N.E.2d at 1123-24 ("Even in the absence of the *in limine* order, counsel's comments were inappropriate. A reference to the impact of an adverse verdict upon defendant's professional reputation is improper as it interjects an improper element into the case and is little more than an appeal to the passions and sympathy of the jury."). Accordingly, plaintiff is entitled to a new trial.

B. WHEN COUNSEL INTENTIONALLY AND PREMEDITATIVELY PREJUDICES THE JURY IN CLOSING ARGUMENT, THE AGGRIEVED PARTY IS ENTITLED TO SANCTIONS, INCLUDING ATTORNEY FEES AND COSTS OF THE TRIAL.

Here, defense counsel set about to inflame the jury. It cannot be said that it was done in the heat of battle because defense counsel incorporated the cartoon in the power point presentation and included typewritten false statements that plaintiff's counsel and expert would "turn it into malpractice every time." (See Index at p. 18 & pp. 34-52.)

In *Honaker*, this Court also provided the following discussion and warning for future cases:

> In her brief, the plaintiff suggests that the practice of introducing prejudicial remarks at the end of a case or in closing argument has become a routine practice with some attorneys because, practically, "what judge is going to mistry a case at the end of a week of trial?" The plaintiff contends, anecdotally, that defense attorneys often violate a trial court's evidentiary rulings in an attempt to "flush a losing case down the drain at plaintiff's expense."
>
> **We caution trial courts to be vigilant against such misconduct, and reiterate our holding in *Tennant* that a "party who violates a motion *in limine* is subject to all sanctions legally available to a trial court, including contempt, when a trial court's evidentiary order is disobeyed."** 194 W.Va. at 113, 459 S.E.2d at 390.

Honaker, 210 W.Va. at 62 n. 8, 552 S.E.2d at 797 n. 8 (emphasis added).

In the recent case of *Clark v. Druckman*, 218 W.Va. 427, 624 S.E.2d 864 (2005)[2] -- after applying the litigation privilege as a bar to the filing of most claims for civil damages against an attorney for conduct as well as communications occurring during or in relation to a civil action -- the Court stated:

> Our ruling today does not permit attorneys or their clients to act without consequence during the litigation process. However, we believe our *Rules of Civil Procedure*, our *Rules of Professional Conduct*, and the court's inherent authority provide adequate safeguards to protect against abusive and frivolous litigation tactics.
>
> * * *
>
> Notwithstanding the availability of sanctions under the *Rules of Civil Procedure* and the availability of disciplinary action for violations of the *Rules of Professional Conduct*, a trial court always has inherent authority to regulate and control the proceedings before it and to protect the integrity of the judicial system. As noted by the Florida Supreme Court in *Levin[, Middlebrooks, Mabie Thomas, Mayes & Mitchell, P.A., v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994)}:
> "[c]learly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, **a trial court would have the ability to use its contempt**

[2] *Clark v. Druckman* was brought on behalf of Dr. Clark by defense counsel in the present case.

> **powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt."**
> *Levin*, 639 So.2d at 608-9. **Where an attorney's misconduct so offends the integrity of the judicial system and a party's right to a fair trial, the trial court has inherent authority to impose corrective sanctions.**

Clark, 218 W.Va. at 434-35, 624 S.E.2d at 871-72 (emphases added).

In light of the Court's warning in *Honaker* and its statements in *Tennant* and *Clark*, plaintiff submits that an award of monetary sanctions, constituting the attorney fees and costs of plaintiff in trying the case, are appropriate and more than justified. As previously noted, without both remedies being awarded, how else can defendants or defense counsel who make such improper comments in closing for the purpose of saving a losing case ever be effectively discouraged from doing so? Simply stated, if they are not required to also pay monetary sanctions for their misconduct in such cases, they have no incentive to act otherwise. If their improper comments succeed in prejudicing the jury, they succeed in winning the case and at worst face a new trial thereafter if plaintiffs are able to convince the trial court or appellate court to grant one—a result they are certainly willing to face as opposed to the one they feared initially, that of losing their case outright.

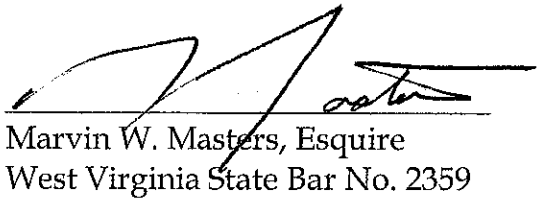
VI. RELIEF PRAYED FOR

For all of the foregoing reasons, Appellant respectfully prays that this Honorable Court grant her Appeal and reverse the trial court's order denying her motion to strike the verdict and award her a new trial and for sanctions. Further, Appellant respectfully requests that she be awarded the costs and expenses incurred in prosecuting this

appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by the Court.

MICHELLE JONES, in her
capacity as Administratrix of the
Estate of Julia Toler, Deceased

By Counsel



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34619

MICHELLE JONES, in her
capacity as Administratrix of the
Estate of Julia Toler, Deceased,

Appellant,

v.

EDWARD R. SETSER, M.D.; ST. MARY'S
HOSPITAL OF HUNTINGTON, INC.; and
HUNTINGTON CARDIOTHORACIC
SURGERY, INC.,

Appellees.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Appellant, do hereby certify that a true and exact copy of the foregoing "Brief of Appellant" was served upon:

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in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 2nd day of April, 2009.

Marvin W. Masters